

88-104

Office-Supreme Court, U.S.
FILED

JUL 18 1983

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CLERK

In The

Supreme Court of the United States

October Term, 1983

RAYMOND P. TANGO, JR.,

Petitioner,

vs.

STATE OF NEW JERSEY,

Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF NEW JERSEY**

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QUESTIONS PRESENTED FOR REVIEW

1. Did the courts below err in denying petitioner's claim that the introduction of the grand jury testimony (incriminating petitioner) of his co-defendant who did not testify at trial, combined with flagrant misrepresentation of that testimony by the prosecutor, abridged petitioner's right of confrontation under the Sixth Amendment to the Constitution?

2. Did the state courts' refusal to allow petitioner the opportunity to cross-examine a witness against him with respect to possible bias constitute a denial of his right of confrontation under the Sixth Amendment to the Constitution?

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**PETITION FOR A WRIT OF CERTIORARI TO THE
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Raymond P. Tango, Jr. petitions for a writ of certiorari to review the judgment of conviction of petitioner which was affirmed by the Superior Court, Appellate Division of the State of New Jersey and which the Supreme Court of the State of New Jersey declined to review.

OPINIONS BELOW

The Opinion of the Appellate Division of the Superior Court of New Jersey is printed *infra* in App. A at 1a. The order of

the Supreme Court of New Jersey denying the petition for certification is printed *infra* in App. B at 14a. The Judgment of Conviction filed August 6, 1981 is printed *infra* in App. C. at 16a.

JURISDICTION

The decision of the Supreme Court of the State of New Jersey was filed on May 19, 1983. Petitioner invokes the jurisdiction of this Court under 28 U.S.C. §1257.

CONSTITUTIONAL PROVISIONS INVOLVED

Petitioner alleges a violation of his rights under Amendment VI of the United States Constitution, which reads as follows:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

STATUTES AND RULES INVOLVED

Petitioner was convicted of murder, contrary to N.J.S.A. 2C:11-3, printed in App. D at 20a, and possession of a weapon for an unlawful purpose, contrary to N.J.S.A. 2C:39-4(a), printed in App. E at 27a.

The out-of-court statements of petitioner's co-defendant were introduced into evidence in redacted form pursuant to Rule

3:15-2(a) of the Rules of Criminal Procedure, printed in App. F at 28a.

STATEMENT OF THE CASE

A. Procedural History

Petitioner Raymond Tango, Jr., Louis Pasquarosa and Charles Stango, Jr. were charged in Union County Indictment No. 427-80 with murder contrary to N.J.S.A. 2C:11-3 (App. D) and possession of a firearm with a purpose to use it unlawfully against the person of another contrary to N.J.S.A. 2C:39-4(a) (App. E). Petitioner Tango and Louis Pasquarosa were tried together without Charles Stango, Jr. who failed to appear at trial.

The Honorable John P. Walsh, J.S.C. presided at a jury trial from opening statements of counsel throughout the testimony of all state and defense witnesses from June 16 through July 9. On the evening of July 9, 1981, Judge Walsh entered the hospital and consequently was unable to sit to the conclusion of the trial.

In his absence, the Honorable A. Donald McKenzie, J.S.C. was assigned to complete the trial. Judge McKenzie heard summations and delivered the charge on July 13, 1981, and received a verdict on July 14, 1981. Petitioner Tango and Louis Pasquarosa were found guilty on both counts of the indictment.

On August 6, 1981, a judgment of conviction was entered sentencing petitioner Tango on Count 1, the charge of murder, to life imprisonment with a 20-year parole disqualification and on Count 2, the weapons offense, to a concurrent term of seven (7) years. A fine of \$10,000 payable to the Violent Crimes Compensation Board was also imposed (App. C).

Motions for a new trial were denied by Judge McKenzie on July 31, 1981 and September 25, 1981. An appeal was argued on December 7 and December 21, 1982 before the Appellate Division of the Superior Court of the State of New Jersey. An Opinion affirming the trial court's decision was filed on February 2, 1983 (App. A).

A notice of petition for certification was filed on February 2, 1983 to the Supreme Court of the State of New Jersey. That petition was denied by order entered May 19, 1983 (App. C).

B. Factual Background

On the evening of October 16, 1980, William Earle Mann was shot several times in a car in a parking lot of the Sheraton Inn Hotel in Elizabeth, New Jersey.

A number of witnesses heard the sound of gunfire and saw a car speeding away in the parking lot. When the police arrived, they found Mann, mortally wounded, and defendant Louis Pasquarosa, who had been shot in the arm. Before he lost consciousness and died, Mann allegedly told a police officer that he had been shot by three men. Physical evidence indicated that Mann had been shot while inside the car, and that two guns had been used in the killing. Blood stains on Pasquarosa's jacket were consistent with Mann's blood type.

There was no physical evidence adduced linking petitioner Tango to the gun, the vehicle or the victim. The only evidence linking Tango to the crime in any way was the fact that his company car had been parked in the Sheraton Inn lot that evening and that he had been seen in the lounge of the Inn sometime between 3:00 and 5:00 that afternoon. It was also established that in the past Tango had had business and/or social dealings with Mann and that at various times before October 16, 1980 he had

telephoned both Mann and Pasquarosa. In addition, Mann's girlfriend, Theresa Ireland, whose testimony, descriptions and identifications varied and shifted from day to day, and whose credibility was called severely into question, testified that Raymond Tango (along with Louis Pasquarosa and Charles Stango) was an occupant of the car entered by Mann on the evening in question.

Finally, and most critically, the prosecution introduced the grand jury testimony of Louis Pasquarosa. Pasquarosa had testified before the grand jury that he dined with Tango and Stango on the evening in question. Because Pasquarosa did not testify in his own defense at the trial, and was thus not subject to cross-examination, the introduction of his grand jury testimony was objected to by Tango's attorney. The prosecutor moved under Rule 3:15-2(a) of the Rules of Criminal Procedure (App. F) to have Pasquarosa's statements redacted, and accordingly Tango's name was deleted from the portion read to the jury.

In its redacted form as read to the jury, Pasquarosa's testimony was that he had dined on the evening in question with Charles Stango and that while dining he had received a telephone call from Mann, who told Pasquarosa that he wished to see him and would meet him in front of the Sheraton in five or ten minutes. After paying the bill, Pasquarosa parted from Stango and stepped out the front door. Outside he saw Mann walking toward the Sheraton sign. Pasquarosa approached him and said, "Hi Earle, how are you doing." Mann replied "I need some dough." When asked how much, he said "Whatever you can give me." Pasquarosa then testified to "a nightmare"; suddenly Mann grabbed him and said, "Louis, help me" and then Pasquarosa heard noises like firecrackers. Pasquarosa tried to run away, but fell and hit his face. He did not remember what happened after he fell to the ground and did not observe any vehicle driving away. This testimony was completely inconsistent with the unimpeachable scientific and physical evidence adduced at trial showing that Mann

was shot inside the automobile where spent bullets and Mann's tooth were recovered. That physical evidence in turn led to the logical inference that Pasquarosa, wounded by gunfire and found lying a few feet from Mann's body, had also been inside the vehicle at the time of the shooting.

Pasquarosa's grand jury testimony was the basis of the State's theory of the case. According to that theory, Tango, Stango and Pasquarosa dined together at the Sheraton Inn on the evening of October 16, 1980 and during the meal, Pasquarosa answered a telephone call from Mann. Pasquarosa, according to the prosecutor's summation, then lured Mann to the Sheraton parking lot. There Mann entered an automobile and was killed by the three dinner companions. Pasquarosa's out-of-court statements constituted the sole factual support for the inference that Pasquarosa, Stango and Tango dined and conspired together.

It was petitioner's theory that he had been brought into the case because of the animosity of members of the Elizabeth police department, Detective Brojanowski and his partner Detective Guslavage. Specifically, there had been a physical altercation some six months earlier between petitioner and Detective Guslavage.

Detective Brojanowski, who had spoken to Mann just prior to his final lapse into unconsciousness, and had been a principal investigating officer, was called as a State's witness. Petitioner's counsel wished to show that the detective was biased against his client, and that he had an impermissible interest in bringing in Tango as the unknown third man in the killing. Counsel attempted to cross-examine Brojanowski on this point, but was denied the opportunity on the grounds that any mention of the incident between Tango and Guslavage was "hearsay" as to Brojanowski.

Because of the illness of Judge Walsh, Judge McKenzie presided at summations. During his summation, the prosecutor

referred to the grand jury testimony of Louis Pasquarosa from which Raymond Tango's name had been deleted and argued that Pasquarosa failed to identify Tango out of fear:

Now I submit to you, there are only two reasons why Louis Pasquarosa would swear under oath in that Grand Jury and give the story he gave. One reason is he is afraid to identify Raymond Tango. . . .

That comment of the prosecutor was objected to by petitioner's counsel.

After the summations, the new judge instructed the jury on accomplice liability. The court charged:

The provision of our statute means that not only is the person who actually commits the criminal act responsible for it, but anybody who is an accomplice in the commission of that crime, anybody who either aids or assists that person or agrees to aid or assist that person in any way supporting or supplementing the efforts of that person, is also guilty of a commission of a crime.

C. Issues Raised

The issue of the prejudicial effect of co-defendant Pasquarosa's redacted grand jury testimony, which did not fully ripen until the prosecutor's flagrantly prejudicial comments, was in effect raised when counsel made a timely objection to the prosecutor's remarks at the conclusion of his summation. Counsel's objection was to the general impropriety of prosecutor's remarks concerning Pasquarosa's non-identification of petitioner. The court instructed the jury to rely upon its recollection. This

federal constitutional issue was again raised in the Superior Court, Appellate Division and in the Supreme Court.

The issue of the denial of petitioner's right to cross-examine Detective Brojanowski as to bias was raised by counsel at trial when his opportunity was denied by the court. This federal constitutional issue was again raised in the Superior Court, Appellate Division and in the Supreme Court.

REASONS FOR GRANTING THE WRIT

I.

THE COURTS BELOW ERRED IN DENYING PETITIONER'S CLAIM THAT THE INTRODUCTION OF THE GRAND JURY TESTIMONY (INCRIMINATING PETITIONER) OF HIS CO-DEFENDANT WHO DID NOT TESTIFY AT TRIAL, COMBINED WITH FLAGRANT MISREPRESENTATIONS OF THE PROSECUTOR, ABRIDGED PETITIONER'S RIGHT OF CONFRONTATION UNDER THE SIXTH AMENDMENT TO THE CONSTITUTION.

A. Introduction

Joint trials conserve state funds, diminish inconvenience to witnesses and public authorities and avoid delays in bringing those accused of crime to trial. The argument has been advanced that these benefits should not have to be sacrificed by requiring separate trials for the purpose of using an admission implicating more than one defendant against the declarant only. That argument was rejected definitively by this Court in *Bruton v. State*, 391 U.S. 123 (1968), where it was held that limiting instructions to a jury not to consider an out-of-court statement by a non-testifying co-defendant against the defendant in a joint trial are a wholly

inadequate substitute for the right of cross-examination guaranteed under the Confrontation Clause of the Constitution.

The right of confrontation in a criminal prosecution is conferred by the United States Constitution. The Confrontation Clause of the Sixth Amendment, made applicable to state prosecutions through the Fourteenth Amendment, is a safeguard to insure fairness and accuracy in criminal proceedings. *Pointer v. Texas*, 380 U.S. 400, 403-405 (1965); *Parker v. Randolph*, 442 U.S. 62, 72-73 (1979); *Bruton v. United States*, *supra* at 136. As the Court held in *Ohio v. Roberts*, 448 U.S. 56, 63 (1980), the Sixth Amendment Confrontation Clause envisions:

... a personal examination and cross examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face-to-face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief [quoting *Mattox v. United States*, 156 U.S. 237, 242-243 (1895)].

It is the right of confrontation which secures the most effective and reliable means of exposing falsehood and revealing truth — the right to cross-examination. *Pointer v. Texas*, *supra*; *Douglas v. Alabama*, 380 U.S. 415, 418 (1965).

The Confrontation Clause allows a defendant to protect himself not only against the jury's belief in the truth of the particular statement offered, but also from the innuendo, inaccuracy and confusion inherently attendant upon untested half-truths. In this respect, constitutional protections are commensurate

with evidentiary considerations. As this Court noted in *Bruton v. United States*, *supra*, 319 U.S. at 136, n. 12:

It is suggested that because the evidence is so unreliable the need for cross examination is obviated. This would certainly seem contrary to the acceptance of the rule of evidence which would require exclusion of the confession as to Bruton as "inadmissible hearsay, a presumptively unreliable out-of-court statement of a non-party who is not a witness subject to cross examination." Post, at P. 138. "The theory of the Hearsay rule is that the many possible deficiencies, suppressions, sources of error and untrustworthiness, which lie underneath the bare untested assertion of a witness, may be best brought to light and exposed by the test of cross examination." 5 Wigmore, Evidence 1362 at 3. The reason for excluding this evidence as an *evidentiary* matter also requires its exclusion as a *constitutional* matter. Surely the suggestion is not that *Pointer v. Texas*, for example, be repudiated and that all hearsay evidence be admissible so long as the jury is properly instructed to weigh it in light of "all the dangers of inaccuracy which characterize hearsay generally."

Thus, in a joint trial an out-of-court statement of a non-testifying co-defendant is inadmissible if it implicates or incriminates the defendant. Any curative device must meet that exacting standard. Limiting instructions to the jury certainly do not. *Bruton v. United States*, *supra*. Although the selective deletion of incriminating portions of a co-defendant's admission has been upheld as a sanitizing technique by some courts, the practice has been questioned not only in terms of its efficacy in preventing prejudice but also in terms of the dangers inherent in allowing

the prosecution to reveal only certain sections of a statement. *United States v. Volkell*, 251 F. 2d 333, 337 (2 Cir. 1958); Note, 72 Harv. L. Rev. 920, 990 (1959).

The most obvious danger is that the redaction may be insufficient. The mere removal of a defendant's name from a written statement may well be insufficient to remove the implication against him. There is a converse danger, however, that the redaction may conceal so much that it presents for the consumption of the jury a wholly erroneous set of facts. The problem with a redaction is that it is a lie. Although it is a lie fabricated for the benefit of the defendant, it may so distort the truth that it results in that defendant being convicted on the basis of fictitious evidence. Nothing could be more alien to the concept of a fair trial.

B. The Prejudicial Effect of the Redacted Testimony Coupled With the Prosecutor's Remarks

In this case, petitioner and Louis Pasquarosa were tried together on the charge of murdering William Earle Mann. In their joint trial the State moved to introduce portions of Pasquarosa's grand jury testimony taken five days after the death of Mann. Pasquarosa's grand jury testimony, by placing defendant at the scene of the crime and in the company of Pasquarosa on the evening of October 16, 1980, implicated petitioner in the murder.

The State proposed to delete petitioner's name from the transcript pursuant to the New Jersey Court Rules (*see* Appendix F), and a hearing was held for that purpose. At the trial, a portion of Pasquarosa's grand jury testimony was read to the jury with Tango's name removed. The deletion procedure was premised on the dubious assumption that any reference to Tango would thereby be eliminated. The surgical removal of petitioner's *name* from the incriminating transcript, however, did not protect against its

effect in indirectly identifying petitioner in the context of other trial testimony and, most tellingly, the wholly improper remarks of the prosecutor in summation.

Even apart from the prosecutor's remarks, Pasquarosa's grand jury testimony constituted an indirect identification of Tango. It was the State's theory from the outset that Tango, Stango and Pasquarosa dined together at the Sheraton Inn and there planned the murder of Mann. According to this theory, as expounded in the prosecutor's summation, Pasquarosa lured Mann to the Sheraton parking lot, where he entered a brown Chevrolet and was killed by the three dinner conspirators. Apart from the admission of Pasquarosa's statements, there is no factual support for the inference or argument that Pasquarosa, Stango and Tango dined and conspired together.

An employee at the Sheraton testified that Louis Pasquarosa¹ dined with two gentlemen until 6:30 or 6:45 p.m. that evening. She did not know the identity of the two companions. A bartender at the Sheraton observed Tango in the lounge, but not later than 5:00 p.m. He recalled seeing Pasquarosa enter the lounge alone after 4:30 p.m. No witness testified that Tango dined with Pasquarosa or that the two were together at the Sheraton on the evening of October 16, 1980. Pasquarosa's redacted grand jury testimony concerning the dinner at the Sheraton makes repeated references to Charles Stango. Before introduction of this testimony, the jury knew only that two unknown gentlemen were sitting at the table with Pasquarosa. After the identification of Stango, the process of association left the powerful suggestion of Tango's presence.

Throughout the trial testimony Stango's name was inextricably linked with Tango's. Stango never appears alone in the transcript but always in the company of petitioner, when he had met Mann in a bar in Newark, a bar in Elizabeth, outside

other clubs and in front of Mann's residence. Detective Brojanowski testified he saw Tango and Stango together in Elizabeth in early July, 1980. But for a single letter, even their names are identical. Tango and Stango, in the context of this trial, were virtual alter egos. The identity of the third man at the dinner table with Pasquarosa and Stango on the evening of October 1, 1980, based on the redacted grand jury testimony, was as obvious as if petitioner's name had been shouted.

In the context of the trial testimony, the redacted statement of Pasquarosa was ineffective. In the shadow of the prosecutor's remarks, it was utterly distorted. During his summation, the prosecutor effectively reinserted the name of Raymond Tango in the redacted statement by his improper remarks. Moreover, he argued that Pasquarosa failed to identify Tango out of fear when in fact Tango's name had been removed by the prosecutor himself as the result of a hearing held prior to the introduction of the evidence. The prosecutor made the following remarks:

You've heard three men, Raymond, Charlie and Louis. And how many men have you heard testimony about would meet Mann at the Sheraton? . . .

* * *

The evidence shows that Louis Pasquarosa's job was to lure Mann down to the Sheraton. . .

* * *

[A]ccording to Debby McMann, Louis Pasquarosa was having dinner with two men. They were both white men. They weren't dressed in suits, but she really didn't get a look at their faces. What does

Pasquarosa say? He tells us that he had dinner with Charles Stango. Now, we know from Debby McMann's testimony, that one of them got up and left the table and then came back. They were seated together for a period of time and then she saw Louis leave by himself. The other two had already gone.

* * *

Now I submit to you there are only two reasons why Louis Pasquarosa would swear under oath in that grand jury and give the story he gave. One reason is he's afraid to identify Raymond Tango. . .

First, there was absolutely no support in the record that Pasquarosa was afraid of or threatened by defendant. In fact, Pasquarosa had testified to precisely the opposite in the grand jury testimony given to the very prosecutor who made the above-referenced remarks. The remark implied that Tango had silenced Pasquarosa by intimidation and therefore obstructed justice. The prosecutor in effect argued that an inference of guilt could be drawn because petitioner was not mentioned in the grand jury transcript. That is, Tango intimidated Pasquarosa into omitting his name, thereby evidencing a consciousness of guilt.

It was fundamentally unfair for the prosecutor to suggest to the jury that Pasquarosa, out of fear of Tango, refrained from identifying Tango when he had not in fact so refrained and, indeed, Tango's name had been deleted from the grand jury transcript on the prosecutor's own motion. The prosecutor's remark that Pasquarosa was "afraid to identify Raymond Tango" neatly explained why Tango was not mentioned as the third man at the dining table. But this tidy explanation violated the very purpose

of the Confrontation Clause as expounded in *Bruton*: to protect a defendant from identification in a co-defendant's statement that is not subject to cross-examination. It is fundamentally improper for a prosecutor in summation to refer to a redacted confession for purposes of corroboration when the evidence it corroborates is being used against the non-confessing defendant. *United States v. Alvarez*, 519 F. 2d 1052, 1054 (3 Cir. 1975).

The prosecutor, in short, invented a fiction to explain a fiction. He succeeded at once in nullifying the effect of the redaction and in fabricating a new and deliberately false reason for the jury to convict the petitioner. *Bruton* held that an abridgement of the right to cross-examination cannot be cured through the device of limiting instructions to the jury; *a fortiori*, it cannot be rectified by deliberate falsehood.

C. Additional Prejudice from the Co-defendant's Statement

In addition, petitioner was prejudiced by Pasquarosa's grand jury testimony because the State proceeded on the theory that Tango and Pasquarosa aided and abetted one another in a murder. The prosecutor, both in his opening statement and in his summation, invited the jury to hold Tango responsible for the conduct of Pasquarosa. Moreover, the trial court charged the jury on accomplice liability without any curative instructions. (See Statement of the Case, *supra*.)

Through the admission of the grand jury testimony, the prosecutor was able to advance his theory that Tango and Pasquarosa acted in concert. For instance, Pasquarosa in the grand jury testimony admitted receiving a phone call from Mann at the Sheraton on the evening in question. From this evidence, the prosecutor was able to argue that "Louis Pasquarosa's job was to lure Mann down to the Sheraton." These hearsay statements, admissible under no exception to the rule and not subject to cross-

examination, are imputed to Tango as well as to Pasquarosa. Thus, to whatever degree Pasquarosa's grand jury testimony implicated himself, it equally implicated petitioner in violation of *Bruton*.

In addition, Pasquarosa's incredible version of the shooting damaged petitioner in the context of a joint trial. Pasquarosa said that the shooting occurred while he and Mann were standing outside the Sheraton, a version wholly inconsistent with the physical evidence. Standing accused side-by-side with Pasquarosa, Tango certainly was contaminated by Pasquarosa's out-of-court statements. Petitioner, unable to confront the declarant of these statements, was denied his constitutional right of confrontation.

Judge McKenzie, substituted for Judge Walsh after the conclusion of the testimony, gave the jury no curative instructions with respect to the prosecutor's improper remarks or the use of the grand jury testimony against petitioner. The trial court did not comply with *Rule 1:12-3(b)** which requires, in the circumstances, that the substituted judge familiarize himself with the proceedings through a "complete transcript" of all the testimony.

As noted *supra*, *Bruton* found limiting instructions to be an inadequate safeguard against the prejudicial impact of a co-defendant's out-of-court statement spread before the jury to incriminate the defendant. Since no limiting instructions were

* Rule 1:12-3(b) provides:

If a judge is prevented during trial from continuing to preside therein, another may be designated as provided in paragraph (a) to complete the trial as if he had presided from its commencement, provided however he is able to familiarize himself with the proceedings and all of the testimony therein through a complete transcript thereof.

offered to the jury here, there can be no indulgence in the belief that the grand jury testimony was viewed solely against the declarant, and that its damage did not carry over to petitioner.

Although there was no request by petitioner's counsel for limiting instructions nor an objection to the charge, given the devastatingly prejudicial impact of Pasquarosa's statement together with the prosecutor's comment thereon, it is obvious that its introduction possessed a clear capacity to bring about an unjust result. Failure of the trial court to ensure that those statements would not be used against petitioner contributed to the denial of his right of confrontation.

II.

THE COURTS BELOW ERRED IN HOLDING THAT REFUSING TO ALLOW PETITIONER THE OPPORTUNITY TO CROSS-EXAMINE A WITNESS AGAINST HIM WITH RESPECT TO POSSIBLE BIAS DID NOT CONSTITUTE A DENIAL OF HIS RIGHT OF CONFRONTATION UNDER THE SIXTH AMENDMENT TO THE CONSTITUTION.

Petitioner attempted to explore on cross-examination the possible bias of Detective Brojanowski, a principal State's witness who participated in the investigation of the murder of William Earle Mann. In particular, petitioner's counsel sought to cross-examine Detective Brojanowski on his bias against petitioner who, in April 1980, had a physical confrontation with Detective Brojanowski's partner, Detective Guslavage. Counsel told the court that "the reason that Raymond Tango was in this case was because of the animosity of Guslavage who is Brojanowski's partner."

The details of the incident between petitioner and Detective Guslavage had been placed on the record by petitioner's counsel at a pretrial hearing. Detective Guslavage admitted that he had

been punched in the mouth and the head by petitioner. The court, however, believed that because Detective Brojanowski had not been a party to the altercation, he could not testify as to his knowledge or belief as to the incident. Accordingly, the court limited cross-examination to what Detective Brojanowski knew from "personal" knowledge.

The court erroneously ruled that the right to call Detective Guslavage to the stand was an adequate alternative to cross-examining Detective Brojanowski as to his motive for testifying. And later, in the presence of the jury, defense counsel attempted to elicit a motive of bias underlying Detective Brojanowski's testimony. The prosecutor objected on the grounds of hearsay and relevance, and his objection was sustained.

As a matter of federal constitutional law, defendant has a right to expose the bias of a witness. The Sixth Amendment to the Constitution guarantees the right of an accused in a criminal prosecution "to be confronted with the witnesses against him." The principal purpose of the right of confrontation is to secure the right of cross-examination. *Pointer v. Texas*, 380 U.S. 400 (1965); *Douglas v. Alabama*, 380 U.S. 415, 418 (1965). It is acknowledged that cross-examination is the most effective means of testing the believability of a witness and the truth of his testimony. *Davis v. Alaska*, 415 U.S. 308, 315-316 (1974).

The cross-examiner is permitted not only to delve into the story of the witness in order to test the witness' perceptions and memory, but to impeach, *i.e.* to discredit the witness. This Court in *Davis v. Alaska*, *supra*, 415 U.S. at 316, spoke directly to the issue:

A more particular attack on the witness' credibility is effected by means of cross examination directed toward revealing possible biases, prejudices, or

ulterior motives of the witness as they may relate directly to issues or personalities in the case at hand. Partiality of a witness is subject to exploration at trial, and is "always relevant as discrediting the witness and effecting the weight of his testimony." 3A *J. Wigmore Evidence* 940, P 775 (Chadbourn rev. 1070). We have recognized that the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination. 415 U.S. at 316.

It was petitioner's defense, even before selection of a jury, that he had been brought into the Mann murder as a result of animosity stemming from the past physical confrontation between himself and Detective Brojanowski's partner. This incident had been referred to the Union County Grand Jury and was "open and pending" during the trial. Detective Guslavage himself participated in the murder investigation and was on the scene on October 16, 1980. Two days later, he took a statement from Pasquarosa. Detective Guslavage was not called as a witness at trial.

Detective Brojanowski offered key testimony in the case against petitioner. His description of Mann's behavior prior to death conflicted with other evidence at trial. He also testified to the photographic identification of petitioner and to statements allegedly made by witness Theresa Ireland. It was therefore essential for petition to establish that the motivating force behind Detective Brojanowski's testimony was his bias against him. The trial court prevented counsel from effectively cross-examining Brojanowski on the erroneous grounds that Brojanowski had not been an actual witness to the confrontation. The court believed that inquiry was barred due to the Hearsay Rule.

The trial court was manifestly in error on this point. The evidence as to the fight was not hearsay at all since it was not being introduced to prove the truth of the matter it contained but to show that Brojanowski had heard of it, might have believed it and acted in response to it. The Hearsay Rule interposes no obstacle to the use of information received that may precipitate an emotion of anger or malice.

Moreover, the court erroneously failed to recognize that bias of the witness is not collateral, and is always a relevant factor in assessing credibility. The jury should have been given the benefit of this evidence as to bias so that it could fully assess Brojanowski's credibility and actions. Defense counsel had a right to develop Detective Brojanowski's interest in the outcome of the case, his hostility and animosity toward defendant, and his motive for framing the defendant. Admissibility is not governed by the likelihood of proving the contentions which form the basis of bias, but by a defendant's right to test fully all the State's proofs. This much a defendant is guaranteed under the federal constitution. *Davis v. Alaska, supra.*

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted so this Court can review this matter and the petitioner's conviction can be reversed.

Respectfully submitted,

MORRIS BROWN

Counsel of Record

BARRY T. ALBIN

LINDA LASHBROOK

FREDERICK J. DENNEHY

WILENTZ, GOLDMAN

& SPITZER

Attorneys for Petitioner

Raymond P. Tango, Jr.

Dated: July 15, 1983

**APPENDIX A — OPINION OF SUPERIOR COURT OF NEW
JERSEY, APPELLATE DIVISION FILED FEBRUARY 2, 1983**

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-5465-80T4
A-5666-80T4

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

RAYMOND P. TANGO, JR. and LOUIS PASQUAROSA,

Defendants-Appellants.

Argued December 7 and 21, 1982 Decided
February 2, 1983

Before Judges Matthews, Antell and Francis.

On appeal from Superior Court, Law Division,
Union County.

Barry T. Albin argued the cause for appellant
Tango (Wilentz, Goldman, Spitzer, attorneys;
Linda Lashbrook, on the brief).

Harvey Weissbard argued the cause for appellant
Pasquarosa.

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David V. Brody, Deputy Attorney General, argued the cause for respondent (Irwin I. Kimmelman, Attorney General of New Jersey, attorney).

PER CURIAM

Defendants, Louis Pasquarosa (Pasquarosa), Raymond Tango, Jr. (Tango) and Charles Stango (Stango) were indicted for murder (*N.J.S.A.* 2C:11-3) and possession of a firearm for the purpose of using it unlawfully against another person *N.J.S.A.* 2C:39-4(a)). Stango became a fugitive before the trial. Pasquarosa and Tango were tried jointly, and they were found guilty on both counts of the indictment. Tango was sentenced to life imprisonment with a 20 year parole disqualification on the murder charge and to a concurrent term of seven years on the weapon charge. He was also fined \$10,000, payable to the Violent Crimes Compensation Board. Pasquarosa was sentenced to a term of 20 years on the murder charge with a 10 year parole ineligibility and a concurrent seven year term on the weapon offense. He was fined \$5000, payable to the Violent Crimes Compensation Board. This is a consolidated appeal on several grounds from the judgments of conviction entered against both defendants.

Pasquarosa appeared before the grand jury and gave testimony at the trial in relation to the murder. Portions of his grand jury testimony were read into evidence at trial over the objection of Pasquarosa's attorney, who made a timely objection as the testimony was about to be read into the record. The judge held a hearing on the admissibility of the proffered grand jury testimony. He also considered the presence of Tango's name in the testimony. He held that the grand jury testimony was admissible as to Pasquarosa, but references to Tango's name were deleted in order to avoid any prejudice to that defendant. After

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the redaction was completed, the admitted portions were read to the jury.

Pasquarosa's first contention is that the grand jury testimony should have been excluded since he was not warned, prior to testifying before the grand jury, that he was the target of a focused inquiry. We find no merit in this contention. There is no federal constitutional requirement that target warnings be given. The United States Supreme Court, in *United States v. Washington*, 431 U.S. 181, 97 S.Ct. 1814, 52 L.Ed. 2d, 238 (1977), has stated that the prohibition against self-incrimination is not violated where a potential defendant is not warned that there is a prospect he will be indicted. *Id.* at 189, 97 S.Ct. at 1820, 52 L.Ed.2d at 246. In that case the Court rejected defendant's attempt to suppress his grand jury testimony stating that "target witness status neither enlarges nor diminishes the constitutional protection against compelled self-incrimination" with the result that such warnings "add nothing" to the protection of Fifth Amendment rights. *Ibid.*

The prohibition against self-incrimination is recognized by statute in New Jersey. *N.J.S.A. 2A:84A-18, -19*; see *Evid. R. 24, 25*. Our Supreme Court has determined that in the absence of a definite directive from the United States Supreme Court, no warnings need be given to the ordinary witness before a grand jury. See *State v. Vinegra*, 73 N.J. 484, 488 (1977); *State v. Fary*, 19 N.J. 431, 435 (1955). In *Fary* the Court held that warnings must be given "to a witness not under formal criminal charges if it is made unmistakably to appear that the grand jury was actually conducting an investigation directed against the witness and summoned him to testify with the purpose of getting evidence to fix a criminal charge on him." *Id.* at 438. The witness has a burden of showing that the so-called investigation was merely a ruse to get him to testify against himself. Any doubt is to be resolved in favor of the validity of the indictment. *Ibid.*

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Here the trial judge found that Pasquarosa was not the target of the investigation. There was sufficient credible evidence on which the judge could have based such a finding. *See State v. Johnson*, 42 N.J. 146, 162 (1964). The judge found as a fact that the prosecutor had a reasonable belief that Pasquarosa had witnessed the shooting of the murder victim and brought him before the grand jury to determine whether the story he told was true and whether he could identify the assailants. The judge noted that the prosecutor did not totally believe Pasquarosa's story that the shooting took place outside in a parking lot. The prosecutor had evidence that it had occurred in a car, and he hoped that Pasquarosa's testimony would support the latter theory. On the other hand, the judge listed six reasons to support his view that the prosecutor was not totally certain that Pasquarosa was lying:

1. A worker from the hotel saw Pasquarosa outside the Sheraton after leaving work at about 6:30 P.M.

2. A witness saw either two or three men leave in the car. If there were three men, the third person could not have been Pasquarosa.

3. Pasquarosa was shot.

4. Both Mann and Pasquarosa were in the parking lot after the shooting.

5. Mann did not name Pasquarosa as one of the three men.

6. Theresa Ireland did not identify Pasquarosa as one of the men in the murder vehicle

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(Ireland did finally identify Pasquarosa on October 23, 1980, two days after the grand jury hearing).

It is obvious that the prosecutor harbored some suspicion as to Pasquarosa's part in the murder. However, mere suspicion is not enough to make a witness a target and invalidate an indictment. *State v. Fary*, 19 N.J. at 439. This court has applied the *Fary* test to determine whether to suppress, at trial, testimony given before a grand jury on the basis that the witness was a target of the grand jury investigation. See *State v. Cattaneo*, 123 N.J. Super. 167, 172 (App. Div. 1973). The judge's finding that Pasquarosa was not a target should, therefore, be upheld.

Tango challenges the admission of Pasquarosa's grand jury testimony at their joint trial on another basis. He claims that he was denied the opportunity to confront a witness against him even though all references to him were deleted in a pretrial hearing held in compliance with R. 3:13-1(b). The testimony read to the jury was as follows:

Q. What about Charles Stango? Do you know him?

A. Yes sir.

Q. How long have you known him?

A. About a year.

Q. With regard to Mr. Charles Stango have you ever had any business dealing with Charles Stango?

A. No Sir.

...

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Q. And there came a time that you went into the restaurant. Is that correct?

A. Yes sir.

Q. And you met Charles Stango. Is that correct?

A. Yes, sir.

Q. And I take it you had dinner with Charles Stango. Is that correct?

A. Yes, sir.

...

Q. And now, there came a point in time, according to your statement, that you left the lounge to meet Mr. Mann. Is that correct?

A. Yes, sir.

Q. You left the restaurant?

A. Yes, sir.

Q. When you left the restaurant had Charles Stango already left?

A. After I paid the bill?

Q. Yes.

A. To the best of my knowledge.

...

Q. Charlie was sitting in the dining room when you got there?

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A. I think so, or out in the foyer, the--the whatever you call it.

There was no objection made at the trial to the admission of the evidence as redacted, and reversal on this ground would only be mandated on a finding of plain error. *R.* 2:10-2.

The rule in New Jersey is that a prior statement of a codefendant, which is otherwise inadmissible against the defendant challenging its use, is not admissible in a joint trial unless all potentially prejudicial references to the defendant who did not give the statement can be effectively deleted. *State v. Young*, 46 *N.J.* 152, 156-157 (1965). This right was established because of the danger of substantial prejudice to a defendant from a statement otherwise inadmissible against him.

The admission of a confession of a codefendant who does not testify at trial also denies the right of cross examination, as guaranteed by the Sixth Amendment, to a defendant challenging its admission. *Bruton v. United States*, 391 U.S. 123, 128, 88 S. Ct. 1620, 1623 20 *L.Ed.* 2d 476, 479 (1968).

Tango claims that the deletions made in the grand jury testimony were not effective because of the context of the statement. See *State v. Young*, 46 *N.J.* at 159. *Young* defined deletion as "the elimination of not only direct and indirect identification of codefendants but of any statements that could be damaging to the codefendants once their identity is otherwise established." *Ibid.* Thus the prejudicial effect of admitting a redacted confession of a codefendant must be considered in context or in light of all of the circumstances surrounding its introduction. *State v. Simms*, 140 *N.J.Super.* 164, 170 (App. Div. 1976).

Any prejudice to Tango as a result of reading Pasquarosa's grand jury testimony to the jury was, at most, miniscule. There

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was no reference in that testimony to a third person. A waitress did testify that Pasquarosa dined with two other men on the evening in question. This is the only link in the trial testimony to Tango. There is no inference that Tango was this third person other than the fact that he was identified by Theresa Ireland as being the man in the car with Stango later in the evening. A jury, therefore, might have speculated that Tango was the third person at dinner, but such an inference is neither definite nor inescapable.

Both defendants contend that they were improperly denied the opportunity to cross examine Detective Brojanowski as to possible bias. The alleged bias arose out of a previous investigation in which Brojanowski and another Elizabeth Police Department detective, Guslavage, had taken part. In the course of that investigation there had been an altercation between Guslavage and the defendant Tango. Tango conceived that, by reason of that altercation, Brojanowski might be biased toward him, and he wished to disclose this to the jury. The trial court, on the prosecutor's objection, conducted a *voir dire* at which Brojanowski testified that, while he had been involved in the investigation as mentioned, he was not present during the alleged altercation between Tango and Guslavage. The trial court ruled that Tango's attorney would not be permitted to question Brojanowski as to his hearsay knowledge of the incident involving Guslavage. Thereafter, Tango's attorney questioned Brojanowski in the presence of the jury as to his knowledge of any animosity between Tango and Guslavage to which Brojanowski responded, "I'm not that friendly with Guslavage to answer that question." After successive attempts to question Brojanowski about his knowledge of any bad feeling between Tango and Guslavage, the court precluded further cross examination.

As to Pasquarosa's challenge to the trial court's prohibition of Brojanowski's testimony, we note at the outset our doubt that

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he has any standing to challenge that ruling since it neither related to nor prejudiced him in any manner. Nevertheless, we find no error in the trial court's ruling. It is well established that the eliciting of facts which are relevant to the issue of a witness's bias or motivation is an integral part of the right of confrontation guaranteed by the Sixth Amendment. *See Davis v. Alaska*, 415 U.S. 308, 316-318, 94 S.Ct. 1105, 1110-1111, 39 L.Ed. 2d. 347, ____ (1974). But that right is subject to the broad discretion of the trial judge to control the extent of questioning for the purpose of efficient trial disposition. *See id.* at 316, 94 S.Ct. at 1110, 39 L.Ed. 2d at ____.

Here, Tango sought to impeach Brojanowski's credibility by questioning him about an incident of which Brojanowski had no personal knowledge. In effect, the cross examination was aimed at having Brojanowski's state of mind revealed as a result of a prior state of mind on the part of Guslavage. The attempt to establish Brojanowski's state of mind, however, necessarily involved hearsay. Moreover, the relationship between Guslavage's and Brojanowski's states of mind is so weak that such questions exceed even the wide latitude afforded the cross examination of witnesses.

Arguendo, if the trial judge was in error in prohibiting this cross examination, the error was harmless. Our State court decisions following *Davis*, above, have held that it is reversible error for a trial judge not to allow proper cross examination on bias, if the testimony of the witness whose bias is sought to be shown is crucial to a determination of guilt. *See State v. Crudup*, 176 N.J.Super. 215, 221-222 (App. Div. 1980); *State v. Mazua*, 158 N.J.Super. 89, 105 (App. Div. 1978), cert. den. 78 N.J. 399 (1978); *State of Vaccaro*, 142 N.J.Super. 167, 177-178 (App. Div. 1976), cert. den. 71 N.J. 518 (1976). These decisions indicate, however, that an error of this type may be harmless when the

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testimony of the possibly biased witness is not essential to a conviction. *Crudup*, 176 *N.J.Super.* at 221-222; *Mazur*, 158 *N.J.Super.* at 105; *Vaccaro*, 142 *N.J.Super.* at 177-178.

Most of Brojanowski's testimony was echoed by other witnesses and related to the taking of testimony and discovery of physical evidence. The most important testimony, that Mann told him that "three men" were the killers, was also given by Officer Dugan, to whom Mann had made the same statement at an earlier time.

Tango also contends that the following remarks made by the prosecutor on summation caused Pasquarosa's grand jury testimony to have prejudicial impact:

You've heard three men, Raymond, Charlie and Louie. And how many men have you heard testimony about would Mann meet at the Sheraton?

...

The evidence shows that Luis Pasquarosa's job was to lure Mann down to the Sheraton.

...

[A]ccording to Debby McMann, Luis Pasquarosa [was] having dinner with two men. They're both white men. They weren't dressed in suits, but she really didn't get a look at their face [*sic*]. What does Pasquarosa say? He tells us that he had dinner with Charles Stango. Now, we know from Debbie McMann's testimony, that one of them, got up

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and left the table and then came back. They were seated together for a period of time and then she saw Louie leave by himself. The other two had already gone.

...

Now I submit to you, there's only two reasons why Luis Pasquarosa would swear under oath in that Grand Jury and give the story he gave. *One reason is he's afraid to identify Raymond Tango.* [Emphasis added]

These comments, however, are taken largely out of context, and their prejudicial effect, if any, is insignificant when viewed in the context of all the evidence adduced at the trial, including the eyewitness account of Theresa Ireland. The prosecutor's remarks during summation do not, in conjunction with Pasquarosa's statement, rise to the level of plain error. We go further and hold that any possible error asserted by Tango is harmless beyond a reasonable doubt since his guilt is overwhelmingly established by the record. *State v. Biddle*, 150 N.J. Super. 180, 183 (App. Div. 1977), certif. den. 75 N.J. 542 (1977). The prosecutor's remarks certainly did not create the possibility of an unjust result "sufficient to raise a reasonable doubt as to whether the error led the jury to a result it might not otherwise have reached." *State v. Melvin*, 65 N.J. 1, 18-19 (1974) (quoting *State v. Macon*, 57 N.J. 325, 336 (1971)).

Pasquarosa sets forth several other contentions which are as follows:

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POINT II

THE EVIDENCE AGAINST PASQUAROSA WAS INSUFFICIENT TO SUSTAIN HIS CONVICTION FOR FIRST DEGREE MURDER.

POINT III

PASQUAROSA'S MOTION FOR A NEW TRIAL SHOULD HAVE BEEN GRANTED.

POINT IV

THE PROSECUTOR'S SUMMATION WAS SO UNFAIR AS TO DENY THE DEFENDANT A FAIR TRIAL.

Tango also raises other grounds for appeal which are set forth below:

POINT III

THE PROSECUTOR'S IMPROPER REMARKS IN SUMMATION ON MATTERS NOT IN EVIDENCE DENIED DEFENDANT A FAIR TRIAL.

POINT V

DEFENDANT SUBMITS THAT THE SENTENCE IMPOSED WAS MANIFESTLY EXCESSIVE.

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We have considered these contentions in our review of the record submitted on the appeal, including the presentence reports. We find these issues raised by the defendants to be clearly without merit. *R.* 2:11-3(e)(2).

Affirmed.

**APPENDIX B — ORDER OF THE SUPREME COURT OF
NEW JERSEY DENYING PETITION FOR CERTIFICATION
FILED MAY 19, 1983**

SUPREME COURT OF NEW JERSEY

C-688 SEPTEMBER TERM 1982

20,899

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

RAYMOND P. TANGO, JR.,

Defendant-Petitioner.

ON PETITION FOR CERTIFICATION

To the Appellate Division, Superior Court:

**A petition for certification of the judgment in A-5465-80T4
having been submitted to this Court, and the Court having
considered the same;**

**It is ORDERED that the petition for certification is denied
with costs; and it is further**

**ORDERED that the appeal in the within matter is dismissed
pursuant to R. 2:12-9.**

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WITNESS, the Honorable Robert L. Clifford, Presiding
Justice, at Trenton, this 17th day of May, 1983.

s/ Stephen W. Townsend
Clerk

**APPENDIX C—JUDGMENT OF CONVICTION OF THE
NEW JERSEY SUPERIOR COURT FILED AUGUST 6, 1981**

NEW JERSEY SUPERIOR COURT

UNION COUNTY

LAW DIVISION — CRIMINAL

S.B.I. NO. 37009A

DATE OF ARREST 10/18/80

**JUDGMENT OF CONVICTION AND ORDER OF
COMMITMENT**

Filed Aug. 6, 1981

Walter G. Halpin

County Clerk

Deputy Clerk

THE STATE OF NEW JERSEY

vs

RAYMOND P. TANGO, JR.

**The defendant on 12/12/80 was indicted on Indictment #427, 1980
TERM.**

**The defendant on 1/9/81 entered a plea of not guilty to the
Indictment for the crime(s) of: (Please include Title, Statute and
Degree)**

Murder, N.J.S. 2C:11-3

**Possession of a Weapon for Unlawful Purpose (Second
Degree), N.J.S. 2C:39-4(a)**

Appendix C

and the defendant having on

6/8, 6/9, 6/10, 6/11, 6/15, 6/16, 6/22, 6/23, 6/24, 6/25,
6/29, 6/30, 7/1, 7/6, 7/7, 7/8, 7/9, 7/13, 7/14/81

___ RETRACTED PLEA OF NOT GUILTY AND
ENTERED A PLEA OF GUILTY TO:

XX BEEN TRIED with a JURY and a verdict of GUILTY
TO: COUNTS #1 & #2

Murder, N.J.S. 2C:11-3

Possession of a Weapon for Unlawful Purpose (Second
Degree), N.J.S. 2C:39-4(a)

IT IS, THEREFORE, on 7/31/81 ORDERED AND ADJUDGED
that the defendant be and is sentenced

Count #1 — Custody of the Commissioner of the Department
of Corrections for life imprisonment, to be eligible for
Parole after serving twenty (20) years.

Count #2 — Custody of the Commissioner of the Department
of Corrections for seven (7) years, to be served
concurrently with sentence imposed on Count #1.

A penalty of \$25.00 is imposed on each count on which the
defendant was convicted unless the box below indicates a higher
penalty pursuant to N.J.S.A. 2C:43-3.1.

___ penalty imposed on count(s) ___ is \$ ___ respectively.

Total fine _____. Total restitution ____

Total V.C.C.B. Penalty \$10,000.00.

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Installment payments, if applicable, are due at the rate of \$____
per ____.

IT IS FURTHER ORDERED THAT THE SHERIFF DELIVER
THE DEFENDANT TO THE AFORENAMED INSTITUTION
TO SERVE HIS/HER SENTENCE.

STATEMENT OF REASONS REQUIRED BY R.3:21-4(e)
APPEARS ON THE REVERSE SIDE.

ATTORNEY FOR DEFENDANT

Upon entry of Guilty Plea of conviction

D. McALEVY

D. McALEVY

At time of sentencing

s/ Walter G. Halpin
COUNTY CLERK

Defendant to receive R.3:21-8
credit for time spent in custody

From 10/18/80 to 11/12/80
From 7/14/81 to 7/31/81

Days credit 44

Date July 31, 1981

Appendix C

STATEMENT OF REASONS, R.3:21-4 (e)

Defendant has been convicted of assault and battery as a juvenile and assault and battery on a police officer as an adult. He has refused to divulge any information concerning his background to the probation officer. Therefore, the court perceives no mitigating circumstances diminishing this supremely violent, cold blooded and well planned killing of a human being. From the circumstances of this offense and from his prior record, the court is satisfied that this defendant would kill again under similar circumstances. Some consideration due to his age and that this is his first custodial sentence is reflected in the less than maximum parole disqualifier.

s/ A. Donald McKenzie
JUDGE

HON. A. DONALD McKENZIE
J.S.C.

APPENDIX D — N.J.S.A. 2C:11-3**2C:11-3. Murder**

a. Except as provided in section 2C:11-4 criminal homicide constitutes murder when:

(1) The actor purposely causes death or serious bodily injury resulting in death; or

(2) The actor knowingly causes death or serious bodily injury resulting in death; or

(3) It is committed when the actor, acting either alone or with one or more other persons, is engaged in the commission of, or an attempt to commit, or flight after committing or attempting to commit robbery, sexual assault, arson, burglary, kidnapping or criminal escape, and in the course of such crime or of immediate flight therefrom, any person causes the death of a person other than one of the participants; except that in any prosecution under this subsection, in which the defendant was not the only participant in the underlying crime, it is an affirmative defense that the defendant:

(a) Did not commit the homicidal act or in any way solicit, request, command, importune, cause or aid the commission thereof; and

(b) Was not armed with a deadly weapon, or any instrument, article or substance readily capable of causing death or serious physical injury and of a sort not ordinarily carried in public places by law-abiding persons; and

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(c) Had no reasonable ground to believe that any other participant was armed with such a weapon, instrument, article or substance; and

(d) Had no reasonable ground to believe that any other participant intended to engage in conduct likely to result in death or serious physical injury.

b. Murder is a crime of the first degree but a person convicted of murder may be sentenced, except as provided in subsection c. of this section, by the court to a term of 30 years, during which the person shall not be eligible for parole or to a specific term of years which shall be between 30 years and life imprisonment of which the person shall serve 30 years before being eligible for parole.

c. Any person convicted under subsection a.(1) or (2) who committed the homicidal act by his own conduct or who as an accomplice procured the commission of the offense by payment or promise of payment, of anything of pecuniary value shall be sentenced as provided hereafter:

(1) The court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or pursuant to the provisions of subsection b. of this section. Where the defendant has been tried by a jury, the proceeding shall be conducted by the judge who presided at the trial and before the jury which determined the defendant's guilt except that, for good cause, the court may discharge that jury and conduct the proceeding before a jury empaneled for the purpose of the proceeding. Where the

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defendant has entered a plea of guilty or has been tried without a jury, the proceeding shall be conducted by the judge who accepted the defendant's plea or who determined the defendant's guilt and before a jury empaneled for the purpose of the proceeding. On motion of the defendant and with consent of the prosecuting attorney the court may conduct a proceeding without a jury.

(2) At the proceeding, the State shall have the burden of establishing beyond a reasonable doubt the existence of any aggravating factors set forth in paragraph (4) of this subsection. The defendant shall have the burden of producing evidence of the existence of any mitigating factors set forth in paragraph (5) of this subsection. The State and the defendant shall be permitted to rebut any evidence presented by the other party at the sentencing proceeding and to present argument as to the adequacy of the evidence to establish the existence of any aggravating or mitigating factor. Prior to the commencement of the sentencing proceeding, or at such time as he has knowledge of the existence of an aggravating factor, the prosecuting attorney shall give notice to the defendant of the aggravating factors which he intends to prove in the proceeding.

(3) The jury, or if there is no jury, the court shall return a special verdict setting forth in writing the existence or non-existence of each of the aggravating and mitigating factors set forth in

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paragraphs (4) and (5) of this subsection. If any aggravating factor is found to exist, the verdict shall also state whether it is or is not outweighed by any one or more mitigating factors.

(a) If the jury or the court finds that any aggravating factor exists and is not outweighed by one or more mitigating factors, the court shall sentence the defendant to death.

(b) If the jury or the court finds that no aggravating factors exist, or that any aggravating factors which exist are outweighed by one or more mitigating factors, the court shall sentence the defendant pursuant to subsection b.

(c) If the jury is unable to reach a unanimous verdict, the court shall sentence the defendant pursuant to subsection b.

(4) The aggravating factors which may be found by the jury or the court are:

(a) The defendant has previously been convicted of murder;

(b) In the commission of the murder, the defendant purposely or knowingly created a grave risk of death to another person in addition to the victim;

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(c) The murder was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim;

(d) The defendant committed the murder as consideration for the receipt, or in expectation of the receipt of any thing of pecuniary value;

(e) The defendant procured the commission of the offense by payment or promise of payment of anything of pecuniary value;

(f) The murder was committed for the purpose of escaping detection, apprehension, trial, punishment or confinement for another offense committed by the defendant or another;

(g) The offense was committed while the defendant was engaged in the commission of, or an attempt to commit, or flight after committing or attempting to commit robbery, sexual assault, arson, burglary or kidnapping;
or

(h) The defendant murdered a public servant, as defined in 2C:27-1, while the victim was engaged in the

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performance of his official duties, or because of the victim's status as a public servant.

(5) The mitigating factors which may be found by the jury or the court are:

(a) The defendant was under the influence of extreme mental or emotional disturbance insufficient to constitute a defense to prosecution;

(b) The victim solicited, participated in or consented to the conduct which resulted in his death;

(c) The age of the defendant at the time of the murder;

(d) The defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law was significantly impaired as the result of mental disease or defect or intoxication, but not to a degree sufficient to constitute a defense to prosecution;

(e) The defendant was under unusual and substantial duress insufficient to constitute a defense to prosecution;

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(f) The defendant has no significant history of prior criminal activity;

(g) The defendant rendered substantial assistance to the State in the prosecution of another person for the crime of murder; or

(h) Any other factor which is relevant to the defendant's character or record or to the circumstances of the offense.

d. The sentencing proceeding set forth in subsection c. of this section shall not be waived by the prosecuting attorney.

e. Every judgment of conviction which results in a sentence of death under this section may be appealed, pursuant to the rules of court, to the Supreme Court, which shall also determine whether the sentence is disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

L.1978, c. 95, §2C:11-3, eff. Sept. 1, 1979. Amended by L.1979, c. 178, §21, eff. Sept. 1, 1979; L.1981, c. 290, §12, eff. Sept. 24, 1981; L.1982, c. 111, §1, eff. Aug. 6, 1982.

APPENDIX E — N.J.S.A. 2C:39-4**2C:39-4. Possession of weapons for unlawful purposes**

a. Firearms. Any person who has in his possession any firearm with a purpose to use it unlawfully against the person or property of another is guilty of a crime of the second degree.

b. Explosives. Any person who has in his possession or carries any explosive substance with a purpose to use it unlawfully against the person or property of another is guilty of a crime of the second degree.

c. Destructive devices. Any person who has in his possession any destructive device with a purpose to use it unlawfully against the person or property of another is guilty of a crime of the second degree.

d. Other weapons. Any person who has in his possession any weapon, except a firearm, with a purpose to use it unlawfully against the person or property of another is guilty of a crime of the third degree.

L.1978, c. 95, §2C:39-4, eff. Sept. 7, 1979. Amended by L.1979, §179, §3, eff. Sept. 1, 1979.

**APPENDIX F — RULE 3:15-2 OF THE RULES GOVERNING
CRIMINAL PRACTICE****3:15-2. Relief from Prejudicial Joinder**

(a) Motion by State Before Trial. If 2 or more defendants are to be jointly tried and the prosecuting attorney intends to introduce at trial a statement, confession or admission of one defendant involving any other defendant, he shall move before trial on notice to all defendants for a determination by the court as to whether such portion of the statement, confession, or admission involving such other defendant can be effectively deleted therefrom. The court shall direct the specific deletions to be made, or, if it finds that effective deletions cannot practically be made, it shall order separate trials of the defendants. Upon failure of the prosecuting attorney to so move before trial, the court may refuse to admit such statement, confession or admission into evidence at trial, or take such other action as the interest of justice requires.

(b) Motion by Defendant and State. If for any other reason it appears that a defendant or the State is prejudiced by a permissible or mandatory joinder of offenses or of defendants in an indictment or accusation the court may order an election or separate trials of counts, grant a severance of defendants, or direct other appropriate relief.

Note: Source—R.R. 3:5-7. Paragraph (b) amended July 29, 1977 to be effective September 6, 1977; paragraph (a) amended July 16, 1981 to be effective September 14, 1981.